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In the

Supreme Court of the United States

BENJAMIN K. ORIN,

Petitioner,

versus

RICHARD BARCLAY, and his marital community in his individual and official capacity; ROBERT WALLACE, and his marital community, in his individual capacity; ALAN HORNBERG, and his marital community, in his individual capacity; RICK MCCLUSKY, and his marital community, in his individual capacity; CITY OF BREMERTON, a municipal corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Steven T. Reich
Counsel of Record
Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, LLP
2100 One Union Square
Seattle, Washington 98101
(206) 676-7500
Attorneys for Respondents

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

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QUESTIONS PRESENTED

1. Whether the District Court and Ninth Circuit properly granted Respondents Officer Hornberg and Officer McCluskey qualified immunity?

2. Whether this Court should decline to consider Petitioner's arguments concerning the alleged inconsistent decision of the Ninth Circuit with decisions of Sister Circuit Courts and the United States Supreme Court?

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STATEMENT OF THE CASE

Mr. Orin ("petitioner") is a member of the group Positively Pro-Life that regularly participate in demonstrations against abortion at colleges and high-schools. (Excerpts of Record (ER) 60-61, 101; City Supplemental Excerpts of Record (CSER) 39-47). When appearing at schools, the group carry 4 by 5 very graphic and disturbing pictures of damaged, aborted fetuses. (ER, 99; CSER 25-26). One picture shows a severed fetus head held in tongs over a petri dish. A second is of a whole fetus dismembered into numerous pieces. Once at the schools, the group use a method of demonstrating which entails contacting the dean or principal, announcing their intention to demonstrate, and proceeding to an area of the school where the most students will view their signs. (ER 63-65). The signs and demonstration methods invoke strong reactions from the students. Petitioner and his group have been arrested, assaulted, threatened with shootings, punched, grabbed, knocked down, had the signs hit with automobiles, and had the signs torn apart in reaction to the signs and demonstration methods. (ER 78; CSER 53-55). Almost every time the group has appeared at a school, the police have been called to investigate the "disturbance." (ER 62, 77).

On October 30, 1997, petitioner and two other members of the Positively Pro-Life organization arrived unannounced at Olympic Community College ("OCC") to inform the administration that they were going to engage in a demonstration on campus. (ER 100-101; CSER 50). None of the petitioner s group was a student at the school. (ER 84-85). Despite not having advanced permission through the college s permitting process, petitioner was allowed to demonstrate in front of the Bremer Student Center. The OCC campus is small and densely built. The only open space on campus is located in front of the Bremer Student Center, a space which abuts many classroom buildings and which virtually all students would be required to pass through between classes or in order to have lunch. (Appendix A to Barclay s Petition for Rehearing En Banc). The college

administration informed petitioner s group that they could protest provided they did not cause a breach of the peace, not interfere with students access to class, and that they did not engage in religious worship or instruction. (ER 66, CSER 21-24). In anticipation of student response, two campus security guards were assigned to stay with the demonstrators for their protection. (CSER 12, 16).

Within minutes of beginning the demonstration, the college dean s office began receiving complaints about the protesters demonstration methods and their posters. (CSER 23). Nevertheless, the protest was allowed to take place for more than four contentious hours. Despite petitioner s claims that none of the petitioner s group acted "violently," numerous facts demonstrate that the actions of the group incited the student crowd, in addition to the inflammatory posters. A member of petitioner s group admitted to jumping up on tables and speaking at a level loud enough to be heard over the shouting student crowd. (ER 104-05). The same individual admitted to striking a campus security guard which incited the crowd, although he denied the act was intentional. (ER 105; CSER 12, 14, 18, 20). Further, numerous students and security guards submitted evidence of racial and sexist epithets being used by the petitioner s group. (CSER 2, 5, 8, 10, 12, 14, 17, 20). The petitioner denies this yet admits that a member of his group incited a black student to react violently when the student was called a "Jamaica Man." (ER 108, 116; CSER 17, 56-57). Petitioner admits that numerous students throughout the demonstration had to be physically restrained from attacking the group. (CSER 45, 79-81). These actions could be heard from inside campus buildings, with doors closed, from 30 to 40 feet away. (ER 81-82; CSER 5). At least one class was cancelled early due to noise created by the demonstration. (CSER 34).

Toward the end of the four hours on campus, the crowd of approximately 40 to 50 students became more aggressive, began yelling and shouting threats of violence, and began pushing the campus security guards attempting to get at the protesters. (CSER 12, 14, 18, 20). The security

guards determined that potential violence was imminent and that they could no longer protect the safety of the protesters or the students. As a result, campus security asked the protesters to leave campus for violating conditions placed on them by the college. (CSER 12, 14, 18, 20, 51-52). The petitioner and his group refused to leave. (CSER 13, 14, 18, 20). Campus security contacted the City of Bremerton police for assistance and informed them that the situation was becoming physical and to expedite their response. (ER 55-56). Officer Hornberg, who was the first officer to receive the call, was informed by police dispatch to respond to the scene of a reported group of protesters that were refusing to leave and a large unruly crowd that was getting out of hand. Upon Officer Hornberg s arrival, he was met by campus security at the edge of campus and informed that the protesters had violated conditions placed on them by the campus, that the student crowd was agitated to the point of physical violence against the protesters, and that the security staff had insufficient manpower to protect the protesters from the students. Hornberg was further informed that a member of the petitioner s group had hit a security guard, knocking his hat off his head, and that the petitioner s group had been asked to leave for violating the conditions of their stay on campus but refused. (ER 41, 52). At no time was Officer Hornberg informed of the substance of the specific conditions placed on the petitioner by the college. Petitioner presented no evidence demonstrating that the officers had any connection with the establishment of college policies pertaining to demonstrations, or that they were enforcing college guidelines. (Petition for Writ of Certiorari, Appendix p. 16, 32, 34-35).

Upon arriving at the quad, Officer Hornberg observed the large student crowd encircling the petitioner s group angrily shouting and threatening to commit violent acts against the group. (ER 41). The petitioner described the crowd at the time Officer Hornberg arrived as a "clearly and openly hostile opposing mob." (CSER 27). Officer Hornberg asked the petitioner to leave campus several more times and he again refused. The petitioner was then arrested for

trespassing and failure to disperse. (ER 95-96, 106-107). Officer McCluskey arrived after the petitioner was under arrest and was informed by Officer Hornberg of the reasons for the arrest. Officer McCluskey s only involvement was to inform Officer Hornberg to transport the petitioner to the jail for booking. (Petition for Writ of Ceriorari, Appendix p. 13).

Petitioner sued respondents Officer Hornberg, Officer McCluskey and the City of Bremerton. Petitioner asserted claims under 42 U.S.C. § 1983 and 1985(3) for violation of the Equal Protection Clause under the Fourteenth Amendment, and Freedom of Speech and Free Exercise of Religion under the First Amendment. Despite petitioner s claims in his petition before this Court, the Ninth Circuit recognized that no claim was made for violation of petitioner s Fourth Amendment rights in his complaint. (Petition for Writ of Certiorari, Questions Presented for Review; Appendix, p. 6). Instead, petitioner alleged pendent state tort claims, including a common law claim for false arrest. The District Court granted respondents summary judgment based on qualified immunity and the Ninth Circuit affirmed. Petitioner seeks review in this court of the summary judgment granted to the police officers, but seeks no review of the summary judgment granted to the City of Bremerton.

REASONS FOR DENYING THE PETITION

1. Public Schools Are Not Traditional Public Forums

A college or university differs in significant respects from public forums such as streets or parks. College and university facilities are not open to the public in the same way that streets and parks are in that university facilities—private and public—are maintained primarily for the benefit of the student body and the faculty. *Widmar v. Vincent*, 454 U.S. 263, 278 (1981). A university s mission is education, and decisions of this Court have never denied a university s

authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities. *Id.* at 268; *Greer v. Spock*, 424 U.S. 828, 836 (1976) (rejecting the suggestion that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum for purposes of the First Amendment). Where state-operated educational institutions are involved, this Court has long recognized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. *Healy v. James*, 408 U.S. 169, 180 (1972).

> "We...hold that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct."

Esteban v. Central Missouri State College, 415 F.2d 1077, 1089 (8th Cir. 1969), cited with approval in *Healy v. James*, 408 U.S. 169.

In the context of the special characteristics of the school environment, the power of the government to prohibit lawless action is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503, 513 (1969). Activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education. *Healy v. James*, 408 U.S. at 189. Thus, conduct in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the constitutional

guarantees of freedom of speech. *Cf. Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966). Noisy demonstrations that disrupt or are incompatible with normal school activities may be prohibited. Such expressive conduct may be constitutionally protected at other places or times, but next to a school, while classes are in session, it may be prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 120 (1972).

Here, OCC placed conditions upon the petitioner s group, including that they not cause a breach of the peace during their presence on campus. The evidence presented demonstrated that petitioner s group caused a significant disturbance that physically endangered themselves, students and school property, precipitated cancellation of class, and substantially interfered with students ability to obtain the education for which they had paid. These actions in violation of the college s conditions, forced the college to revoke petitioner s license to remain on campus and when he refused to leave, compelled the college s request for police assistance.

2. Officers Hornberg and McCluskey had Probable Cause to Arrest Petitioner and Were Properly Granted Qualified Immunity

Officer Hornberg and Officer McCluskey had no involvement in the placement of any conditions upon the petitioner s stay on campus, no knowledge of the substance of the conditions, or involvement in the revocation of petitioner s license to remain on campus by the college. Officer Hornberg s and Officer McCluskey s only involvement was to respond to the college s request for assistance, obtain information regarding the situation, and independently corroborate that information. The only action taken by the police officers against the petitioner was to enforce the

criminal trespass[1] and failure to disperse[2] statutes in reliance on information obtained. Thus, the only legitimate dispute is whether the respondent police officers possessed probable cause and/or are entitled to qualified immunity for the arrest of the petitioner based on information in their possession.

Probable cause exists when the facts and circumstances within the arresting officer s knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime. *MacKinney v. Nielsen*, 69 F.3d 1002, 1005 (9th Cir. 1995). Further, an informant s description of illegal activity is sufficient to establish probable cause if the totality of the circumstances indicate that the tip is reliable. *United States v. Elliott*, 893 F.2d 220, 223 (9th Cir. 1990). Thus, when an officer has received information from some person—normally the putative victim or any eyewitness—who it seems reasonable to believe is telling the truth, he has probable cause to arrest the accused perpetrator. *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 439 (7th Cir. 1986). The arresting officer need not have personal knowledge of all facts sufficient to constitute probable cause. Probable cause may be based on the collective knowledge of all of the officers involved in the investigation and all of the reasonable inferences that may be drawn therefrom. *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989).

Further, officers are entitled to qualified immunity if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If an officer could reasonably have believed that his actions

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[1] RCW § 9A.52.080 requires evidence that a person "knowingly enters or remains unlawfully in or upon premises of another.

[2] RCW § 9A.84.020 requires evidence of a group of three or more persons, actions which create a substantial risk of injury to any person or property, and a refusal to disperse when ordered to do so by a peace officer.

were legal in light of clearly established law and the information he possessed at the time, then his conduct falls within the protective sanctuary of qualified immunity. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). A qualified immunity analysis begins with the threshold question: based upon the facts taken in the light most favorable to the party asserting the injury, did the officer s conduct violate a constitutional right? *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If no constitutional right was violated, no further inquiry is required. If however, a constitutional violation occurred, the second inquiry is whether the officer could nevertheless have reasonably but mistakenly believed that his conduct did not violate a clearly established constitutional right. *Id.* at 201.

In this case, police dispatch informed Officer Hornberg that a group of protesters was inciting a large, unruly crowd. Upon his arrival, Officer Hornberg was informed by a campus security officer that the petitioner s group had violated the conditions of their license to remain on campus, were creating an unsafe, potentially riotous situation, and were refusing to leave despite orders to leave from campus security. Even though corroboration was unnecessary for the purpose of establishing probable cause, Officer Hornberg confirmed these reports through his personal observations of the demonstration when he arrived at the scene. Officer Hornberg repeatedly asked the petitioner to leave campus and when he refused, he was properly arrested for trespass and failure to disperse.

This case is factually and legally similar to *Kelley v. Myler*, 149 F.3d 641 (7th Cir. 1988). In *Kelley*, the plaintiff was protesting on what was thought to be private property. *Id.* at 644. The property owner asked the plaintiff to leave and when she refused, the property owner called the police. Upon their arrival, the police were informed of the situation by the property owner. The police subsequently asked the plaintiff to leave and she refused, claiming she was on public property. When she refused to leave, she was arrested for trespassing. The property later turned out to be public

property and the charges were dismissed. *Id.* at 644. Plaintiff filed a § 1983 action against the officers alleging lack of probable cause for the arrest. The trial court and the Seventh Circuit found the officers entitled to qualified immunity because the facts and circumstances within the officer's knowledge were sufficient to justify their belief that the plaintiff had committed, or was committing, the offense of trespass. The plaintiff contended the officers should not have made the arrest without checking records for property boundaries. However, the court refused to add this additional requirement to the probable cause determination because the inquiry is whether an officer has reasonable grounds on which to act, not whether it was reasonable to conduct further investigation. *Id* at 646.[3]

No mandate in the Constitution leaves States and governmental units powerless to pass laws to protect the public from the kind of boisterous and threatening conduct that disturbs the tranquility of spots selected by the people for public buildings that require peace and quiet to carry out their functions, such as courts, libraries, schools, and hospitals. *Gregory v. City of Chicago*, 394 U.S. 111, 119 (1969). Here, the undisputed evidence confirms that Officer Hornberg and Officer McCluskey reasonably believed that they were not violating the petitioner's First Amendment rights because they had probable cause to arrest for criminal trespass and failure to disperse. Even if the officers were mistaken and probable cause was not present, their mistake was reasonable and the officers were properly granted qualified immunity. *See Saucier v. Katz*, 533 U.S. 194 (2001).

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[3] *See also Bodzin v. City of Dallas*, 768 F.2d 722 (5th Cir. 1985).

3. The Ninth Circuit Decision Does Not Conflict with Other Circuit Court Decisions or United States Supreme Court Decisions Regarding the Response of Police Officers to Hostile Situations on Public School Grounds

A. Circuit Court Decisions

Because Officer Hornberg and Officer McCluskey possessed probable cause for the petitioner s arrest and are entitled to qualified immunity, petitioner cannot make a valid claim against the officers for violating his free speech rights. As this Court has stated, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Cox v. Louisiana*, 379 U.S. 536, 555, (1965). Nevertheless, petitioner asserts that this Court should accept review because the Ninth Circuit decision conflicts with decisions from the Fifth, Sixth, and Eleventh Circuits with regard to an officer s duty to first attempt to disperse a hostile crowd before effectuating the arrest of the demonstrator causing the mob reaction. Petitioner s assertion is without merit as the Ninth Circuit is **consistent** with the above circuit court decisions regarding free speech in traditional public forums:

> [t]he courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.

Collins v. Jordan, 110 F.3d 1363, 1372 (9th Cir. 1997), citing with approval *Cox v. Louisiana*, 379 U.S. 536, 551 (1965).

However, important factors distinguish the current case from the Fifth, Sixth and Eleventh Circuit decisions

cited by petitioner and the Ninth Circuit s decision in *Collins v. Jordan*, supra. First, Officers Hornberg and McCluskey possessed probable cause to arrest the petitioner for violation of two neutral and narrowly tailored criminal statutes that punished actionable conduct, not the content of speech. Second, petitioner s demonstration and arrest occurred on a public school campus where this Court has repeatedly acknowledged the right and responsibility of public schools to protect their students, facilities, and educational purpose through reasonable regulations. In fact, the Fifth, Sixth, and Eleventh Circuits are **consistent** with the Ninth Circuit decision in this case regarding First Amendment rights and the necessity for reasonable rules allowing a school to advance its educational missions. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5th Cir. 2001) (a school need not tolerate speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school); *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749, 753 (5th Cir. 1966) (it is within the province of school authorities to provide by regulation the prohibition and punishment of acts calculated to undermine the school routine); *Bright v. Nunn*, 448 F.2d 245, 249 (6th Cir. 1971) (school officials have the right to prescribe and control conduct in the schools and must be given wide authority in maintaining discipline and good order on campus); *Murray v. West Baton Rouge Parish Sch. Bd.*, 472 F.2d 438, 442 (5th Cir. 1973) (First Amendment does not give students the right to disrupt openly the educational process in order to press their grievances).[4]

The District Court and Ninth Circuit properly found probable cause for the petitioner s arrest and granted the police officers qualified immunity. Petitioner has failed to present any conflicting authorities within the context of the

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[4] Thus, the Ninth Circuit in this case was correct when it found the school s "no breach of the peace" condition neutral and consistent with the pedagogical purpose of the educational facility.

facts of this case, and this Court should decline review of this case as no true conflict among the circuit courts exists.

B. United States Supreme Court Decisions

The petitioner asserts that the Ninth Circuit decision in this case is inconsistent with decisions of this Court regarding an officer s duties when responding to a hostile crowd. *Terminiello v. Chicago*, 337 U.S. 1 (1949) and *Gregory v. Chicago*, 394 U.S. 111 (1969). The petitioner s claims are without merit. The *Terminiello* and *Gregory* cases disallowed criminal convictions based on overbroad statutes that intruded on protected free speech rights. Neither case addresses whether an officer is entitled to qualified immunity for a proper arrest pursuant to a criminal statute, and neither addresses free speech issues in a public school setting.

Here, probable cause existed for the petitioner s arrest. The criminal trespass and failure to disperse statutes allow ample room for free speech activities yet criminalize conduct the state is authorized to prevent. . The petitioner never challenged the facial validity of either criminal statute for vagueness, indefiniteness, uncertainty, or that the language of the statutes allowed an arrest for protected free speech activities. *See State v. Dixon*, 78 Wn.2d 796, 479 P.2d 931 (1971) (holding the statutory predecessor to Washington s failure to disperse statute constitutional and not violative of First Amendment free speech rights). Rather, petitioner has simply argued that because the campus was public, his speech was protected, and as a result, his arrest was "unconstitutional" because the officers did not first attempt to take action against the hostile student crowd prior to his arrest.

Petitioner s claims are based on the misguided notion that because the college was "public", his actions are constitutionally immunized. This Court has rejected the suggestion that when a public building is made available to the public, it becomes a public forum for the purposes of the

First Amendment. *Greer v. Spock*, 424 U.S. 828, 836 (1976). For example, in *Adderley v. Florida*, 385 U.S. 39 (1966), a demonstration held on the grounds of a local jail to protest the arrest of fellow demonstrators the preceding day where the demonstrators refused to leave the grounds, was held criminally actionable under a *trespass* law. Answering the defendants contention in that case that their presence at the jail site was in a constitutionally protected exercise of freedom of speech and peaceable assembly, this Court declared:

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners argument that they had a constitutional right to stay on the property, over the jail custodian s objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable but also particularly appropriate..." Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, *Cox v. Louisiana*, *supra*, at 554-555 and 563-564. We reject it again. The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.

Adderley v. Florida, 385 U.S. at 47.

Justice Roberts language in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) cited, approved and affirmed in *Ashton v.*

Kentucky, 384 U.S. 195, 199 (1966), applies with equal force to unlawful assembly and breach of the peace:

> The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. *When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.*

Cantwell v. Connecticut, 310 U.S. at 308. (emphasis added).

Petitioner was granted a conditional license to protest on school campus provided his group complied with the college s conditions, including a "no breach of the peace" condition. Petitioner s conduct unquestionably caused a substantial breach of the peace endangering persons, property, and interfering with the pedagogical operations of the college. Both the campus security and police officers reasonably concluded that a substantial risk of violence was imminent. Petitioner was informed that his right to remain on the school campus was revoked and that he was to leave. When petitioner refused to comply with the demands, he was properly arrested for trespassing and failure to disperse. Petitioner has cited no authority from this Court in support of an alleged conflict with the Ninth Circuit s decision in the context of the public school circumstances present here. As such, this Court should deny the petition for review.

4. The Ninth Circuit Decision Does Not Conflict with the United States Supreme Court or the D.C. Circuit Court Regarding the Proper Degree of Scrutiny

Petitioner argues that his arrest was a content-based regulation on his right to conduct free-speech activities on the OCC campus and that the Ninth Circuit failed to address this issue. The cases cited in support of this proposition are inapposite as they simply stand for the principle that a regulation ("ordinance" or "permit"), that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992); *Christian Knights of Ku Klux Klan Invisible Empire Inc. v. District of Columbia*, 972 F.2d 365 (D.C. Cir. 1992).

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government s purpose is the controlling consideration. *Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989). Here, the police officers had no involvement with the placement of any time, place, or manner "regulation" on the petitioner s group as the conditions were placed on them by the college. The petitioner was arrested based on his conduct, not the content of his speech. The police officers were unaware of the specific conditions placed on the petitioner by the college. Petitioner presented no evidence demonstrating that the content of petitioner s speech had any bearing on Officer Hornberg s decision to place him under arrest, or that the officers chose to arrest him over the students because they disliked the content of his speech. In making the arrest, the officers were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and there was no evidence which could demonstrate that the acts of the police officers were a cover for suppression of petitioner s views and

opinions. *Feiner v. New York*, 340 U.S. 315, 319 (1951). Petitioner has failed to support this argument factually or demonstrate that a conflict of legal authorities exists justifying this Court s review.

Petitioner further asserts that the college s "no-disturbance" regulation is facially unconstitutional because it sweeps within its broad scope, activities that are constitutionally protected free speech and assembly, in contradiction to this Court s decision in *Cox v. Louisiana*, 379 U.S. 536 (1965). Petitioner thus appears to argue that because the terms of the college s "no-disturbance" condition were not more clearly defined, the condition is unconstitutional. Once again, these claims are without merit as to the respondent police officers. The police had no involvement with placing any conditions upon the petitioner s stay on campus. The police were not aware of the specifics of the conditions at the time of the arrest and were thus not specifically enforcing any of the conditions. If petitioner takes issue with the terms of the conditions placed on his group by the college, that is a proper issue with the college.[5] Petitioner has failed to present any conflicting authority demonstrating that the officers should be held responsible for the substance of any constitutional or unconstitutional conditions placed on petitioner by the college. This Court should deny the petitioner s request for review.

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[5] Courts have held that school disciplinary codes are not held to the same precision as criminal codes and that some degree of discretion must, of necessity, be left to public school officials to determine what forms of misbehavior should be sanctioned. *Murray v. West Baton Rouge Parish Sch. Bd.*, 472 F.2d 438, 442 (5th Cir. 1973); *Burnside v. Byars*, 363 F.2d 744, 748, (5th Cir. 1966); *Grayned v. City of Rockford*, 408 U.S. 104, 110-111 (1972).

5. The Ninth Circuit's Decision Does Not Conflict with United States Supreme Court Decisions Regarding Officers' Standards for Preventing Imminent Lawless Action

Petitioner asserts that the decision of the Ninth Circuit is in conflict with this Court s decisions regarding whether an officer must establish evidence that the protestor *intentionally* incited imminent lawless action by the audience prior to effectuating an arrest. He asserts that the District Court and Ninth Circuit failed to apply this standard and determine whether the incitement of the student group was an intentional result of his speech.

Petitioner s assertion is without merit. From the information presented to Officer Hornberg and Officer McCluskey, they reasonably concluded that petitioner had been asked to leave campus for violating conditions of his stay and he was thus criminally trespassing when he refused to leave, irregardless of whether or not petitioner "intentionally" incited the student crowd. Further, the officers reasonably concluded that petitioner s actions in a group of 40-50 individuals had intentionally incited the group and that a substantial risk of injury to persons or property existed. When petitioner refused to obey Officer Hornberg s orders to leave campus, he was properly arrested for failure to disperse.

If petitioner s argument is that officers must first have specific evidence of intent to incite violence prior to an arrest, no arrest will survive scrutiny in a free speech context as rarely will a speaker directly urge a crowd to act or react violently. Nor will a speaker likely admit to having such an intent if violence does result from free speech activities. Therefore, an effective and safe way for the petitioner to circumvent the "intent" element would be to incite mob action while pretending to condemn it. This is precisely the case here where any claim by petitioner that he did not intend to incite the students is disingenuously hollow in light of the lengthy and consistent history of violence and police

involvement that accompany his demonstrations. In such a circumstance, no arrest could be justified absent a rare admission of intent. Thus, the true judgment of intent is aided by observation of the petitioner, as was possible for the security guards and police officers.

In performing their jobs, police officers are asked to make split second judgments. As a result, courts are cautious not to "second guess" police officers who are required to assess a potentially dangerous situation and respond to it without studied reflection. *Glasson v. City of Louisville*, 518 F.2d 899, 910 (6th Cir. 1975). Qualified immunity embodies this principle and recognizes that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here false arrest/freedom of speech, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular arrest is legal in those circumstances. If the officer s mistake as to what the law requires is reasonable, the officer is entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. at 205.

Here, Officer Hornberg and Officer McCluskey received information regarding petitioner s violation of college guidelines and reports of escalating violence. These reports were corroborated by Officer Hornberg s independent observations. The petitioner was arrested because probable cause existed for his arrest. However, even if the officers were mistaken as to what the law requires under the exigent circumstances they faced, the mistake was reasonable and qualified immunity was properly granted.

CONCLUSION

Petitioner has failed to identify any authority demonstrating a clearly established rule prohibiting Officer Hornberg and Officer McCluskey from placing him under arrest under the circumstances they faced. Further, petitioner has failed to present cases demonstrating that the

Ninth Circuit s decision here conflicts with authorities from the Circuit Courts or the United States Supreme Court. As such, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Steven T. Reich
Counsel of Record
Gordon, Thomas, Honeywell,
Malanca, Peterson & Daheim, LLP
2100 One Union Square
Seattle, Washington 98101
(206) 676-7500
Attorneys for Respondents